

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Appeals for  
the Federal Circuit and the United  
States Court of International Trade

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THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

## **NOTICE**

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# U.S. Customs Service

## *Treasury Decisions*

19 CFR Part 175

(T.D. 87-125)

### PETITIONER'S DESIRE TO CONTEST DECISION DENYING DOMESTIC INTERESTED PARTY PETITION CONCERNING CLASSIFICATION OF FIBER REINFORCED CELLULOSTIC PLASTIC SAUSAGE CASINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of petitioner's desire to contest decision on domestic interested party petition.

SUMMARY: This document advises the public of the desire of a domestic interested party to judicially contest Customs decision denying its petition requesting the reclassification of certain imported fiber reinforced cellulosic plastic sausage casings composed of paper, regenerated cellulose and glycerin. Based upon the product's component material in chief value, it has been held that the correct classification of the product is under item 790.47, Tariff Schedules of the United States (TSUS), as sausage casings not specially provided for, whether or not cut to length, other. The petitioner contests this decision, contending that all cellulosic plastic sausage casings are to be classified under item 790.45, TSUS, as sausage casings, not specially provided for, whether or not cut to length, of cellulosic plastics materials. This classification would subject the product to a higher rate of duty. The petitioner has advised Customs that it intends to pursue this matter through appropriate court proceedings.

DATE: October 7, 1987.

FOR FURTHER INFORMATION CONTACT: Sheila Murphy, Classification and Value Division (202-566-8181).

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

In Internal Advice (IA) 162/79, file 061462, dated May 27, 1983, Customs determined that the component materials in certain imported fiber reinforced cellulosic plastic sausage casings were paper,

regenerated cellulose and glycerin. In this ruling, Customs described the nine-step process for producing the casings and specified the points in the process at which the value of each of the component materials was to be computed. In accordance with this ruling, Customs determined that the casings were not in chief value of cellulosic plastics materials and were to be classified under item 790.47, Tariff Schedules of the United States (TSUS, 19 U.S.C. 1202), as sausage casings, not specially provided for, whether or not cut to length, other. On January 12, 1984, Customs issued ruling 073604, which reaffirmed the conclusions reached in IA 162/79.

On September 30, 1985, a petition challenging Customs classification of the product was filed with Customs under § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), and Part 175, Customs Regulations (19 CFR Part 175), on behalf of a domestic company which manufactures and wholesales a product similar to that classified in IA 162/79. A notice of receipt of the petition was published in the Federal Register on October 15, 1986 (51 FR 36703), advising the public of the petitioner's contentions and requesting comments on the petition.

Three major arguments were set forth in the petition against Customs classification of the product and in favor of the petitioner's view that the product should be classified under item 790.45, TSUS, as sausage casings, not specially provided for, whether or not cut to length, of cellulosic plastics materials. This classification would subject the product to a higher rate of duty than that of item 790.47, TSUS.

First, it was argued that IA 162/79 was issued in disregard of § 502(b), Tariff Act of 1930, as amended (19 U.S.C. 1502(b)), which bars Customs from reversing or modifying a prior interpretation of the TSUS without the concurrence of the Attorney General or the Court of International Trade. By issuing the 1983 ruling, the petitioner stated, Customs reversed rulings made on October 31, 1975 (038749) and May 12, 1977 (051718), without seeking such concurrence. In those rulings Customs held that fiber reinforced cellulosic plastic sausage casings were classifiable under item 790.45, TSUS. Because Customs did not seek concurrence, the petitioner argued, the IA is void.

The petitioner also argued that the legislative history of the Tariff Schedules Technical Amendments Act of 1965 (Pub. L. 89-241, 79 Stat. 933, amending 19 U.S.C. 1202), reveals a Congressional intent to provide special protection for manufacturers of sausage casings of cellulosic plastic origins whether or not that material is the component material in chief value.

Finally, the petitioner argued that the method set out in IA 162/79 for determining the component material in chief value of fiber reinforced cellulosic plastic sausage casings was incorrect, and that if correct cost allocations were used, the casings would be classifiable as in chief value of cellulosic plastics materials. The petitioner



maintained that certain costs were incorrectly attributed to the paper and to the glycerin rather than to the regenerated cellulose.

Three comments were received in response to the October 15, 1986, nice. As only one of these comments supported the petitioner's viewpoint, and this comment made arguments similar to petitioner's, the following discussion will address these points raised by the petitioner.

#### DISCUSSION OF COMMENTS

It is Customs position that IA 162/79, setting out a new method for determining the component material in chief value of the casings, was not issued in violation of 19 U.S.C. 1502(b). In the principal case construing this section, *Joanna Western Mills Co. v. United States*, 64 Cust. Ct. 218, C.D. 3983 (1970), a petitioner under 19 U.S.C. 1516 claimed that a previously issued abstracted decision should have been followed. The Customs Court held that the provisions for the concurrence of the Attorney General in 19 U.S.C. 1502(b) were of a directory nature only, and that failure to comply did not render void the official actions taken. The court also determined that 19 U.S.C. 1502(b) was enacted solely for the protection of the United States, and was not intended to benefit any designated class of persons. The Court further found that the petitioner had ample means available to contest the classification.

In Customs view, the legislative history does not support petitioner's claim that the description of sausage casings to be classified under item 790.45, TSUS, of "Of cellulosic plastics materials," should be interpreted to read "Almost wholly of cellulosic plastics materials." Before the enactment of the TSUS, sausage casings not provided for as intestines or other prepared animal parts were classified according to component material in chief value. Both the legislative history and the provision in the TSUS use the term "of," defined as naming a component material in chief value. We find no intent to classify the casings, instead, according to essential character.

Finally, we do not agree with the petitioner's method for determining the component material in chief value of the casings, assuming component material in chief value to be the correct standard. We find no justification for breaking down the paper, one of the component materials, into its most basic substances, nor in failing to allocate to the paper the costs of bringing it into a condition where nothing remains to be done to it but to unite it with the other component materials in the finished product. Nor do we agree that the costs of the glycerin, another component material of the casings, should be attributed to the cost of the regenerated cellulose rather than attributed to the glycerin itself. The glycerin in the casings affects both the regenerated cellulose and the paper component materials. It does not become a permanent ingredient in the casings, as it is washed out before the casing is used.

#### DECISION ON PETITION

After careful analysis of the petition and the comments received in response to the notice, and further review of the matter, including review of materials submitted by importers and the petitioner during the development of our position in IA 162/79, Customs decided to continue to classify the casings under item 790.47, TSUS. Customs determined that IA 162/79 was properly issued, that the casings are properly classifiable according to their component material in chief value, and that the current method of determining the component material in chief value of the casings is correct. The petitioner was informed of this decision by letter to their counsel dated June 8, 1987 (CLA-2 CO:R:CV:G 079612 SM).

#### NOTICE OF PETITIONER'S DESIRE TO CONTEST

In response to Customs decision to deny the petition, on June 29, 1987, the petitioner filed notice of its intention to judicially contest the decision in accordance with § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.23, Customs Regulations (19 CFR 175.23).

Customs has reconsidered the matter in light of the petitioner's letter, but remains of the opinion that its June 8, 1987, decision is correct. That decision will stand in the absence of a contrary judgment by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.

#### AUTHORITY

This notice is published under the authority of § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.24, Customs Regulations (19 CFR 175.24).

#### DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM VON RAAB,  
*Commissioner of Customs.*

Approved: September 23, 1987.

FRANCIS A. KEATING II,  
*Assistant Secretary of the Treasury.*

## 19 CFR Part 175

(T.D. 87-126)

**DECISION ON DOMESTIC INTERESTED PARTY PETITION  
CONCERNING CLASSIFICATION OF ORANGE JUICE CON-  
CENTRATE-BASED PRODUCT****AGENCY:** U.S. Customs Service, Department of the Treasury.**ACTION:** Final interpretive rule.

**SUMMARY:** This document gives notice of a change in the tariff classification of an orange juice concentrate-based product consisting of orange juice concentrated to 65° Brix to which certain ingredients were added. The product was classified under item 183.05, Tariff Schedules of the United States (TSUS), as other edible preparations, not specially provided for. After review and analysis of comments received in response to publication of a notice of a domestic interested party petition challenging that classification, Customs has determined that the product is properly classifiable as concentrated orange juice or orange juice made from concentrated orange juice under item 165.29, TSUS. The duty rate for item 165.29, TSUS, is higher than the duty rate for item 183.05, TSUS.

**EFFECTIVE DATE:** This decision will be effective as to merchandise entered, or withdrawn from warehouse, for consumption, on or after November 20, 1987.

**FOR FURTHER INFORMATION CONTACT:** Thomas L. Lobred, Classification and Value Division, U.S. Customs Service, (202-566-8181).

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

On July 26, 1984, Customs issued ruling 553167 (C.S.D. 84-117, 18 Cust. B and Dec. No. 49 at 43, December 5, 1984), which stated that a product consisting of 87 percent orange juice concentrate (65° Brix), 10.5 percent orange peel extract, 2.25 percent citrus acid and less than one percent total of sodium benzoate, orange oil and artificial color, was properly classifiable under the provision for other edible preparations, not specially provided for, in item 183.05, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202).

In this ruling, Customs dismissed classification under item 166.40, TSUS, as beverages, not specially provided for, and item 165.35, TSUS, as any other citrus fruit juice concentrate (now item 165.36, TSUS). Item 166.40, TSUS, was not applicable because Headnote 1, Schedule 1, Part 12, Subpart B, TSUS, indicates that item 166.40, TSUS, only covers products fit for use as beverages, and the subject product is not, in its condition as imported, potable and ready to consume. Classification under item 165.35, TSUS, was

precluded because the subject product was not within the common or commercial understanding of orange juice concentrate, having been processed beyond the scope thereof by the addition of significant and substantial "foreign" or excess ingredients.

On October 17, 1985, a petition was submitted on behalf of a domestic interested party representing domestic citrus growers, pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), and Part 175, Customs Regulations (19 CFR Part 175). The petitioner challenged the tariff classification holding in C.S.D. 84-117. The petitioner stated that the tariff provision relating to fruit juices was amended by § 117, Trade and Tariff Act of 1984 (Pub. L. 98-753), to include in new items 165.27 and 165.29, TSUS, an *eo nomine* provision for orange juices, both in natural and in all forms. The duty rates for items 165.27 and 165.29, TSUS, are higher than the duty rate for item 183.05, TSUS.

The petitioner argued that the basic principles of tariff classification require that the subject product be classified under item 165.29, TSUS, and because an *eo nomine* designation such as item 165.29, TSUS, without limitation or shown contrary legislative intent, judicial decision or administrative practice, and without proof of commercial designation, will include all forms of the article. The mere fact that there may be some added ingredients does not preclude its classification in the *eo nomine* provision. It argued that the added ingredients do not alter the subject product's essential character as orange juice concentrate.

The petitioner also argued that Customs definition of orange juice, which is adopted from the Food and Drug Administration (FDA's) standards of identity, is questionable inasmuch as FDA regulations (21 CFR Part 146) should not define or determine the common meaning of the term for tariff purposes.

A notice inviting the public to comment on the petition was published in the Federal Register on July 30, 1986 (51 FR 27196). The period of time within which comments could be submitted on the petition was extended by notice published in the Federal Register on October 2, 1986 (51 FR 35240). Of the nine comments received, seven supported revocation of C.S.D. 84-117 and two favored Customs affirming its decision.

#### DISCUSSION OF COMMENTS

One commenter questioned whether the petitioner qualified as an "interested party" within the meaning of 19 U.S.C. 1677 (9)(C), (D), or (E), qualified to submit a petition under 19 U.S.C. 1516.

Under 19 U.S.C. 1677 (9)(E), an interested party includes "a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States". This provision, which was promulgated in Title X of the Trade Agreements Act of 1979 (Pub. L. 96-39), represents an expansion of the types of entities which are now eligible to file a domestic interested party

petition under 19 U.S.C. 1516. Counsel for petitioners submitted a letter that the petitioner qualified as a domestic interested party and, in the absence of information to the contrary, Customs has no reason to doubt or question this statement.

The substantive comments urging revocation of C.S.D. 84-117 supported the analysis submitted in the petition. In addition, one commenter argued that if an orange juice concentrate-based product with certain additives was entitled to a lower duty rate than concentrated orange juice, importers would be encouraged to include the additives. This would result in the manufacture of more adulterated orange juice products. Another commenter stated that permitting the product with additives to have a lower duty rate could encourage importers of products without additives to claim the product has additives in order to obtain the lower rate. The commenter notes that the presence of added ingredients would be difficult to detect by Customs.

Customs understands and sympathizes with the enforcement and marketing problems inherent in C.S.D. 84-117 that these commenters note. However, the decision on the correct classification must rest on legal analysis of the issues rather than on enforcement or marketing problems that may occur.

The two commenters who believe that Customs should affirm the position in C.S.D. 84-117 set forth the following arguments:

(1) In C.S.D. 84-117, Customs did not use the FDA regulations to limit the provisions for citrus juice and control the classification of orange juice under the TSUS. Customs was correct in accepting the logical proposition that inasmuch as the orange juice concentrate-based product could not be bought or sold in the U.S. as orange juice, it could not be either commercially or commonly known as orange juice in the U.S.

(2) The amendments made by Pub. L. 90-573 with respect to orange juice are of no consequence in the classification of the product at issue. Under General Headnote 10(c)(i), TSUS, a superior heading cannot be enlarged by inferior headings indented under it, but can be limited thereby. The superior heading in this case is citrus juice. Accordingly, if the product could not be classified *eo nomine* as citrus juice, it cannot be classified *eo nomine* as orange juice.

(3) Contrary to the assertions of the petitioner, there are not sufficient amounts of the subject product being imported to seriously disrupt the market for domestic and imported concentrated and un-concentrated orange juice.

Regarding the first argument, the commenter is correct that Customs did not use the FDA regulations to limit the provisions for citrus juice and control the classification of orange juice under the TSUS, but had decided that the product could not be either commercially or commonly known as orange juice in the U.S. However, after careful analysis and review, Customs has concluded that notwithstanding the presence of additives to the orange juice-concen-

trate based product, the essential character of the product is orange juice concentrate and this product is now covered by the *eo nomine* provision for other orange juice in item 165.29, TSUS.

Regarding the consequence of the amendments to the TSUS made by § 117 of Pub. L. 98-573, Customs has been convinced that the amendments created an *eo nomine* designation in item 165.29, TSUS, under which the subject product falls.

Customs finds support for this view in *Robert Bosch Corp. et al. v. United States*, 63 Cust. Ct. 96, 103-104, C.D. 3881 (1969) in which the Court states:

The principle is well settled that where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision \* \* \*. By contrast, where the difference is in the nature of improvement or amplification, and the essential character is preserved or only incidentally altered, the applicable rule is as expressed in *Nootka Packing Co. et al. v. United States*, 22 CCPA 464, T.D. 47464 (1935), that an unlimited *eo nomine* statutory designation includes all forms of the article in the absence of a contrary legislative intent or commercial designation. *United States v. National Carloading Corp. et al.*, 48 CCPA 70 C.A.D. 767 (1961); *United Carr Fastener Corporation v. United States* (Northern Screw Corp., Party in Interest), 54 CCPA 89, C.A.D. 913 (1967).

Regarding the comment concerning the volume of the subject product being imported, any classification or change in classification is not made on the basis of volume of importations, but rather on legal analysis of the issues.

#### C.S.D. 84-117 REVOKED

After careful consideration of all the comments received and further review of the matter, Customs has concluded that C.S.D. 84-117 should be revoked. An orange-juice concentrate-based product consisting of orange juice concentrate to 65° Brix to which certain ingredients were added is to be classified as concentrated orange juice or orange juice made from concentrated orange juice, under item 165.29, TSUS.

#### AUTHORITY

This notice is published under the authority of § 516(b), Tariff Act of 1930, amended (19 U.S.C. 1516(b), and § 175.22, Customs Regulations (19 CFR 175.22).

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM VON RAAB,  
*Commissioner of Customs.*

Approved: September 25, 1987.

FRANCIS A. KEATING II,  
*Assistant Secretary of the Treasury.*

[Published in the Federal Register, October 7, 1987 (52 FR 37443)]







# U.S. Customs Service

## *General Notice*

19 CFR Part 24

### **CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS**

**AGENCY:** U.S. Customs Service, Department of the Treasury.

**ACTION:** Notice of calculation of interest.

**SUMMARY:** The Tax Reform Act of 1986 established a new method of determining the adjusted rate of interest on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate and is adjusted quarterly. This notice advises the public that the interest rates, as set by the Internal Revenue Service, will be 10 percent for underpayments and 9 percent for overpayments for the quarter beginning October 1, 1987. It is being published for the convenience of the importing public and Customs personnel.

**EFFECTIVE DATE:** October 1, 1987.

**FOR FURTHER INFORMATION CONTACT:** Robert Hamilton, Revenue Branch, National Finance Center, U.S. Customs Service, 6026 Lakeside Boulevard, Indianapolis, IN 46278; (317) 298-1245.

**SUPPLEMENTARY INFORMATION:**

#### **BACKGROUND**

By notice published in the Federal Register on January 5, 1987 (52 FR 255), Customs advised the public that the Tax Reform Act of 1986 (Pub. L. 99-514), amended 26 U.S.C. 6621 mandating a new method of determining the interest rate paid on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate. As amended, 26 U.S.C. 6621 provides that the interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average

market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

#### DETERMINATION

It has been determined that the rates of interest for the period of October 1, 1987—December 31, 1987 are 10 percent for underpayments and 9 percent for overpayments. These rates will remain in effect through December 31, 1987, and are subject to change on January 1, 1988. They will remain in effect until change by another notice in the Federal Register.

Dated: October 6, 1987

WILLIAM VON RAAB,  
*Commissioner of Customs.*

[Published in the Federal Register, October 13, 1987 (52 FR 38037)]

# U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-1077)

TANDON CORP., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND MITSUBISHI ELECTRIC CORP., AND MITSUBISHI ELECTRONICS AMERICA, INC., INTERVENORS-APPELLEES

*Steven E. Lipman*, Lupo, Lipman & Lever, of Washington, D.C., argued for appellant. With him on the brief were *R. V. Lupo*, *Jack Q. Lever, Jr.* and *Sandra A. Sellers*. Also on the brief were *Raymond A. Bogucki*, *Louis A. Mok*, *Scherlachner, Mok & Roth*, of Los Angeles, California, *James A. Hamilton*, *Thomas K. Bourke*, *Riordan & McKinzie*, of Los Angeles, California and *Norman H. Kirshman* and *Michael Harris*, *Kirshman & Harris*, of Los Angeles, California.

*Marcia H. Sundeen*, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With her on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

*Robert M. Taylor, Jr.*, Lyon & Lyon, of Costa Mesa, California, argued for intervenors-appellees. With him on the brief were *Samuel B. Stone*, *Gary M. Anderson* and *David B. Murphy*. Also on the brief were *Thomas P. Ondeck* and *Kevin M. O'Brien*, *Baker & McKinzie*, of Washington, D.C.

Appealed from: U.S. International Trade Commission.

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(Decided September 30, 1987)

Before FRIEDMAN, NEWMAN, and ARCHER, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

Tandon Corporation appeals the final decision of the United States International Trade Commission, which held that Tandon's U.S. Patent No. 4,151,573 ("the '573 patent") was not infringed by certain imported double-sided floppy disk drives and therefore that there was no violation of section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337. *In re Certain Double-Sided Floppy Disk Drives and Components Thereof*, 229 USPQ 968 (USITC 1986). We affirm, on the basis that substantial evidence supports the Commission's finding of noninfringement.

## STANDARD OF REVIEW

In this case that turns on the factual question of infringement, which in turn requires decision of factual questions of technological equivalency as well as the factual underpinnings of claim interpre-

tation, we once more remark on the standard of appellate review that is set by the governing statutes. 19 U.S.C. § 1337(c) provides for appellate review "in accordance with chapter 7 of title 5". 5 U.S.C. § 706, subparagraph (2)(E), imposes the "substantial evidence" standard of review on Commission findings and conclusions. There is a significant difference between the standards of "substantial evidence" and of "clearly erroneous", and in close cases this difference can be controlling. See, for example, R.L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 80-89 (1944), in which was stated, "Policy, authority and history all thus show that the 'clearly erroneous' rule gives the reviewing court broader powers than the 'substantial evidence' formula," at pages 88-89. See also *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966).

It was the intent of Congress that greater weight and finality be accorded to the Commission's findings as compared with those of a trial court. See S. Rep. No. 466, 96th Cong., 1st Sess. 26 (1979). Indeed, the Senate Report criticized the Court of Customs and Patent Appeals' use of a more rigorous standard of review on the question of obviousness (i.e., was the decision "clearly contrary to the weight of the evidence") in *Solder Removal Company v. U.S. International Trade Commission*, 582 F.2d 628, 199 USPQ 129 (CCPA 1978). *Id.*

At the same time, the Senate Report accompanying the Trade Act of 1974 made clear that the Commission's primary responsibility is to administer the trade laws, not the patent laws:

[I]n patent-based cases, the Commission considers, for its own purposes under section 337, the status of imports with respect to the claims of U.S. patents. The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.

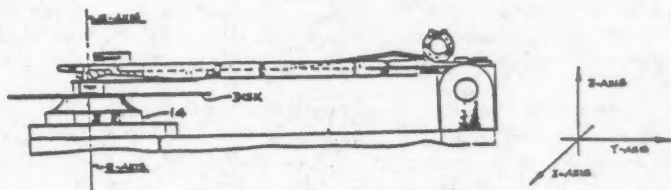
S. Rep. No. 1298, 93d Cong., 2d Sess. 196, reprinted in 1974 U.S. Code Cong. & Admin. News 7186, 7329. Thus, our appellate treatment of decisions of the Commission does not estop fresh consideration by other tribunals. See *Lannom Manufacturing Co., Inc. v. U.S. International Trade Commission*, 799 F.2d 1572, 1577-78, 231 USPQ 32, 36 (Fed. Cir. 1986).

#### BACKGROUND

Tandon alleged unfair practices based on importation by the respondents of certain double-sided floppy disk drives in infringement of certain claims of the '573 patent; the sale of the accused devices was asserted to have the effect or tendency to destroy or substantially injure an efficiently and economically operated industry in the United States. 50 Fed. Reg. 4276 (1985). The respondents were Mitsubishi Electric Corporation, Mitsubishi Electronics America,

Inc., TEAC Corporation, TEAC Corporation of America, Sony Corporation, and Sony Corporation of America. Following a twelve-day hearing the Commission issued a temporary exclusion order. *In re Certain Double-Sided Floppy Disk Drives and Components Thereof*, 227 USPQ 982, 991 (USITC 1985). Before trial on the question of permanent relief Tandon settled with and granted licenses to all respondents except the two Mitsubishi companies (hereinafter "Mitsubishi").

The '573 patent is entitled "Magnetic Recording Device for Double Sided Media", and lists inventors Sirjang L. Tandon, Alfred C. Hackney, and Roy A. Applequist. The claimed invention is an apparatus whereby a pair of magnetic heads, also called transducers, receive and transfer information from and to both sides of a floppy disk.<sup>1</sup> A drive mechanism moves the transducers along the disk radius to access its concentric data tracks as the disk rotates. The Tandon device was illustrated in the '573 patent as:



Tandon's first or lower transducer is shown at (14) as a "button head" transducer. As described in the specification, this transducer is fixed to the carriage, and the upper transducer is gimbaled.

Early floppy disks stored information on only one side, using a single rigidly mounted transducer for data transfer. Opposite the single transducer was a pad that pressed the disk against the transducer and absorbed disk irregularities. The first double-sided floppy disk drive was introduced in 1976 by the International Business Machines Corporation. The IBM disk drive had two symmetric cantilevered transducers, one for each side of the disk, both supported on spring suspensions referred to as gimbal<sup>2</sup> springs. The gimbal springs enabled the heads to rotate around the X, and Y axes, and move in the normal direction along the Z axis.<sup>3</sup> The heads thus followed the irregularities of the disk.

The Tandon disk drive of the '573 patent was stated to solve certain technological problems that inhered in the IBM drive, particu-

<sup>1</sup> A floppy disk is a thin pliant magnetic disk capable of storing computer information.

<sup>2</sup> A "gimbal" is defined as "a device that permits a body to incline freely in any direction \* \* \* Webster's Ninth New Collegiate Dictionary 517 (1984). The ALJ found that in the disk drive industry "the term 'gimbaled' \* \* \* means a suspension system \* \* \* that allows the head to pitch and roll."

<sup>3</sup> Movement of the heads is expressed in relation to a standard three-dimensional coordinate system comprising an "X-axis", a "Y-axis", and a "Z-axis". The disk spins in a plane defined by the X and Y axes. Up-and-down movement occurs in the direction of the Z-axis, that is, perpendicular or "normal" to the plane of the disk. Movement about the X and Y axes is referred to as "pitch" and "roll" motion.

larly misalignment between the heads and disk tracks due to the weak suspension that was designed to compensate for waviness of the disk in the Z direction. Tandon describes its invention as the first successful solution to use of double-sided floppy disk drives, a major factor in the computer revolution, and widely licensed. The Tandon drive uses, as described in the specification, a fixed transducer on one side of the disk and a movable transducer mounted on a gimbal spring on the other side. The movable transducer forces the magnetic disk against the fixed transducer, thus reducing the Z-direction movement of the disk and improving the accuracy of reading/writing to the disk.

The accused Mitsubishi devices are double-sided disk drives which contain two gimballed transducers that, according to the findings of the Administrative Law Judge ("ALJ"), are more stiffly mounted than the IBM transducers, but neither of which is as rigidly fixed as the lower transducer of Tandon. Mitsubishi's lower transducer has a load point which, according to the findings of the ALJ, somewhat limits its movement in the Z-direction. Tandon asserts that the stiffness of the gimballed transducers and the limitation on Z-axis movement brings the Mitsubishi device within the scope of the '573 claims.

Following the trial on permanent relief, in which Tandon, Mitsubishi, and the Commission's investigative staff participated, the ALJ found that the Mitsubishi disk drives did not infringe claims 1, 5, and/or 12 of the '573 patent, which were all of the independent claims at issue, and that injury had not been proven. The Commission affirmed the ALJ's determination of non-infringement, and expressly took no position on the question of injury.

#### CLAIM INTERPRETATION

The principal issue in the Commission's infringement analysis was the degree of "fixedness" of the Mitsubishi lower transducer. Tandon argues that the claims are infringed because the Mitsubishi lower head is "fixed in the Z or normal direction, which Tandon asserts is the only fixedness that the claims require, and that measurements show that the Mitsubishi lower head is as "fixed" as the Tandon lower head.

The Commission thus undertook to interpret the term "fixed" as used in the claims. The Commission concluded that the claims mean that the lower head is fixed not only in the Z direction, but also in the X and Y directions. Tandon ascribes error to this claim interpretation.

Claim interpretation is a question of law, having factual underpinnings. When the meaning of key terms of claims is disputed, as in this case, extrinsic evidence may be adduced including testimony of witnesses, and reference may be had to the specification, the prosecution history, prior art, and other claims. *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 389, 2 USPQ2d 1926, 1929

(Fed. Cir. 1987); *SRI International v. Matsushita Electric Corp. of America*, 775 F.2d 1107, 1117 n.11, 1118, 227 USPQ 577, 582 n.11, 583 (Fed. Cir. 1985). Claims may not be construed one way in order to obtain their allowance and in a contrary way against infringers. *Autogiro Company of America v. United States*, 384 F.2d 391, 398-99, 155 USPQ 697, 703-04 (Ct. Cl. 1967). When the interpretation of claims requires findings of underlying fact, those factual findings are reviewed in accordance with the appropriate evidentiary standard, i.e., that of substantial evidence. *Texas Instruments, Inc., v. U.S. International Trade Commission*, 805 F.2d 1558, 1562 n.2, 231 USPQ 833, 834 n.2 (Fed. Cir. 1986).

The Commission's claim interpretation placed great weight on Tandon's prosecution history in the Patent and Trademark Office. Amendments to claims 1, 5 and 12 were made by Tandon in order to distinguish the claims from a cited reference describing the IBM drive system. The emphasized phrases represent material added by these amendments:

1. A device for maintaining a pair of magnetic transducers in operative relation with both sides of a non-rigid planar magnetic recording media comprising:

a first transducer mounted relative to a first side of the media and having a fixed position in a direction normal to the plane of the media despite movement to different positions along the plane of the media, the first transducer being disposed in data transfer position relative to the media;

a support mechanism adjacent to the second side of the media in a region opposite the first transducer;

a second transducer coupled by gimbal support means to the support mechanism in opposition to the first transducer and movable toward and away from the plane of the media; and

means coupled to said support mechanism for urging said second transducer toward said first transducer and said media to maintain both transducers in operative relation with the intervening media with the first transducer serving as a fixed positional reference despite tendencies of the media to deviate in position from its nominal plane and the second transducer matingly accommodating said tendencies by virtue of its gimbal support.

5. A device for maintaining a pair of magnetic transducers in operative relation with opposite sides of a non-rigid magnetic recording media comprising:

a first non-gimballed transducer mounted on a first side of the media and having a relatively fixed position relative to the plane of the media in which the first transducer is in operative relationship with the first side of the media;

a pivotable support arm having a pivot axis in fixed spatial relationship to the first transducer, and extending along the second side of the media to a region opposite the first transducer;



a second transducer coupled by *gimbal means* to the support arm in opposition to the first transducer and being movable relative to the plane of the media and to the first transducer; and

means coupled to said support arm for urging said second transducer and the media toward said first transducer with a force such that close operative relationship is maintained between each transducer and the associated side of the intervening media, with tendencies of the media to deviate from its nominal plane being compensated by the second transducer.

12. In a magnetic recording system in which a carriage supporting two magnetic heads is shifted radially relative to a center-driven pliant magnetic disc to provide data transfer with selectable record tracks on either side of the disc, the improvement comprising:

a first transducer fixedly coupled to the carriage for bearing against a first side of the disc in an invariant position in a direction normal to the plane of the disc;

and means including a second *gimbal mounted* transducer movably coupled to the carriage for bearing against the second side of the disc in opposed relation to the first transducer, the second transducer being movable toward and away from the plane of the disc and the first transducer, said means including resilient means urging said second transducer toward said first transducer with sufficient force to maintain close operative relationship between both said transducers and the disc despite deviation of portions of the disc during movement thereof, with the second *gimbal mounted* transducer compensating tendencies of the pliant disc to deflect.

Relying on this prosecution history, and on testimony emphasizing the requirement of the claims that the first transducer is in a fixed position, thus serving as a positional reference to the media and the second, gimbaled transducer, the Commission interpreted the word "fixed" to mean that the first transducer does not move in any direction. The Commission referred to the patent specification which "repeatedly emphasizes and explains that in the claimed invention the disk is deflected by the *fixed* transducer and at the same time confined against the *fixed* transducer" (emphasis in original), and to the testimony of Mitsubishi's patent expert Jessup and technical expert Lewis that the term "fixed" has the generally accepted meaning in the disk drive industry as "designed to be not able to move."

Tandon urges that the clauses "fixed position in a direction normal to the plane of the media" in claim 1, and "fixedly coupled \* \* \* in an invariant position in a direction normal to the plane of the disc" in claim 12, only limit movement in the Z direction but do not restrict movement about the X and Y axes. Tandon points out that it was excess movement along the Z axis that flawed the prior



art IBM heads, and argues that the Tandon claims should not be interpreted as requiring a degree of fixedness beyond that needed to distinguish from this prior art. Indeed, Tandon says, the critical text of the claims stating that the lower transducer is fixed in a direction normal to the plane of the media was required by the examiner as a condition of allowance to distinguish the claims over the IBM reference.

However, in distinguishing the IBM reference to the patent examiner, Tandon wrote in its remarks accompanying the amendment that the IBM drive

employs two pivotable, gimbaled heads, which \* \* \* during operation, \* \* \* move with at least two degrees of freedom to attempt to follow the deviations of the floppy disk from its nominal position. In contrast, applicants' system utilizes *one head that has an invariant position* bearing against one side of the media *without spring loading*, and *this head is nongimbaled*. [emphases added]

Although Tandon states that this argument did not apply to claims 1 and 12, the Commission did not accept that view. The Commission's position is sufficiently supported in the record, for there is nothing in the prosecution history that limits the quoted comments to any particular claim or claims. Further, Tandon's specification and prosecution history do not teach any difference in the degree of fixedness of the first transducer among described or claimed embodiments of the invention.

The phrase "normal to the plane" does not appear in the specification as filed. Tandon argues that the amendment adding this phrase shows the intended absence of restraint of movement in the X and Y directions. However, Tandon represented, as it must, that the amendment was "without the addition of new matter." The added phrase can not enlarge the scope of the claims beyond that supported in the specification, and can not change the disclosure in a way contrary to its substance as filed.

37 C.F.R. 1.118(a): \* \* \* All amendments to the specification, including the claims, and the drawings filed after the filing date of the application must conform to at least one of them as it was at the time of the filing of the application.

The addition of the amendment describing movement in the Z direction did not thereby expand the disclosure and claims with respect to movement in the X and Y directions.

Tandon argues that since claim 5 expressly describes the first transducer as non-gimbaled, claims 1 and 12 must be read as encompassing a gimbaled first transducer. Tandon argues that the "doctrine of claim differentiation" prevents reading into claims 1 and 12 this limitation of claim 5, citing *D.M.I., Inc. v. Deere & Co.*, 755 F.2d 1570, 1574, 225 USPQ 236, 239 (Fed. Cir. 1985).

The Commission held that claim 5 does "not differ in scope with respect to the movement of the lower transducer" from that of

claims 1 and 12, and that the term "relatively fixed" in claim 5 "does not have a different meaning from the terms 'fixed' and 'fixedly coupled' as used in claims 1 and 12." The Commission held that this claim interpretation did not violate the doctrine of claim differentiation, since it related to only one element of claim 5, and that claim 5 viewed as a whole could still differ in scope from claims 1 and 12.

There is presumed to be a difference in meaning and scope when different words or phrases are used in separate claims. To the extent that the absence of such difference in meaning and scope would make a claim superfluous, the doctrine of claim differentiation states the presumption that the difference between claims is significant. *D.M.I.*, 755 F.2d at 1574, 225 USPQ at 239; *Autogiro*, 384 F.2d at 404, 155 USPQ at 708. At the same time, practice has long recognized that "claims may be multiplied \* \* \* to define the metes and bounds of the invention in a variety of different ways." *Bourns, Inc. v. United States*, 537 F.2d 486, 492 (Ct. Cl. 1976), 187 USPQ 174, 178 (Ct. Cl. 1975), *aff'd. per curiam*, 199 USPQ 256 (Ct. Cl. 1976). Thus two claims which read differently can cover the same subject matter. Further, as this court stated in *D.M.I.*, 755 F.2d at 1574 n.2, 225 USPQ at 238 n.2, "[c]laims are always interpretable in light of the specification that led to the patent." See also *Autogiro*, 384 F.2d at 397, 155 USPQ at 702 ("No matter how clear a claim appears to be, lurking in the background are documents that may completely disrupt initial views on its meaning"). Whereas under the facts of *D.M.I.* there was "simply no basis in either the specification or prosecution history" for limiting the claim beyond its literal terms, 755 F.2d at 1574 n.2, 225 USPQ at 238 n.2, in Tandon's case the Commission held that the specification and the prosecution history require that the claims be limited to a non-gimballed, fixed, lower transducer. Whether or not claims differ from each other, one can not interpret a claim to be broader than what is contained in the specification and claims as filed. See *Autogiro*, 384 F.2d at 397, 155 USPQ at 702-03 ("[W]ords must be used in the same way in both the claims and the specification."); 37 C.F.R. 1.75(d)(1):

[T]he terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description.

Thus, as a matter of claim interpretation, the Commission correctly held that the inclusion of the term "non-gimballed" in claim 5 did not require that claims 1 and 12 be read to encompass a gimballed first transducer.

We have considered all of the arguments offered by Tandon, and conclude that on this record the Commission correctly interpreted

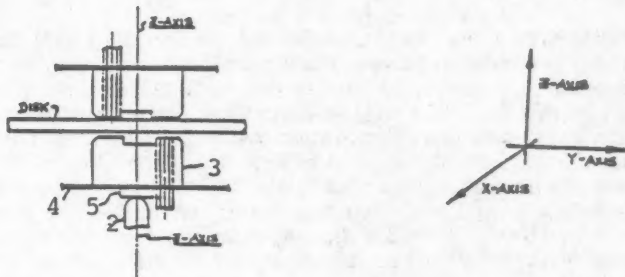
claims 1, 5 and 12 to mean that the first transducer is fixed in all directions.

#### INFRINGEMENT

Applying the claims as it interpreted them, the Commission found that the Mitsubishi drives do not infringe claims 1, 5 and 12 of the '573 patent, either literally or under the doctrine of equivalents. We review these findings to determine whether they are supported by substantial evidence.

#### A

Mitsubishi's accused devices included several models, of which one embodiment was illustrated as:



In the Mitsubishi devices the lower transducer (3) is supported by a gimbal-spring (4) having a load finger (2). A pad (5) is affixed between the gimbal-spring and the load finger. As the ALJ found, the gimbaling of the lower transducer enables roll and pitch movement, while the load finger restricts its movement in the Z-axis direction. The gimbal movement of the upper transducer is not at issue.

Neither Mitsubishi nor the Commission disputes that the patent claims read on the Mitsubishi devices except as to the lower transducer.

Tandon argues that the Mitsubishi devices literally infringe claim 1 since the lower heads of the devices, according to Tandon's measurements, do not move significantly in the Z direction, as discussed below. However, the claim interpretation that the Commission adopted and that we have upheld requires the lower head to be fixed in all directions; further, the ALJ and the Commission found that the lower head of the Mitsubishi device moves significantly in the Z-direction. Substantial evidence supports the Commission's finding that literal infringement has not been proven.

Although the Mitsubishi lower head is supported on gimbal springs and a load point, Tandon argues that the Mitsubishi heads<sup>4</sup> in actual use move no more in the X, Y, and Z directions than do the Tandon heads made in accordance with the claimed invention, and thus that claims 1 and 12 are literally infringed. Tandon submitted measurements showing that the Mitsubishi lower heads moved comparably to the Tandon heads in the Z or normal direction (in microinches):

	Mitsubishi	Tandon (5 1/4")	Tandon (8")	IBM
Z (normal)	29	17	59	3,139

and that the lower heads also moved comparable amounts in the X (pitch) and Y (roll) directions (in arc minutes):

	Mitsubishi	Tandon (5 1/4")	Tandon (8")	IBM
X (pitch)	3.8	0.30	0.45	22.62
Y (roll)	0.60	0.30	0.45	18.17

Tandon argues that its data show that the Tandon and Mitsubishi drives all display relatively small movements in the three directions, and that the gimbal spring of the Mitsubishi lower head is purely "cosmetic". Tandon argues that its calculations are based on Mitsubishi's own data, that Z-axis movement in the Mitsubishi device is negligible due to the presence of the "load finger" making the lower head effectively "fixed", and that X and Y-axis movement of the Mitsubishi device is comparable to that of the Tandon device. Tandon provided the IBM data to show the comparatively large movements in all three directions for drives that are "truly gimbaled".

Mitsubishi submitted conflicting data (in micrometers and degrees):

Drive	Z (normal)	X (pitch)	Y (roll)
Tandon	0.26	0.0017	0.00067
Mitsubishi			
M4841-00M	16.6, 24.1	0.19, 0.65	0.13, 0.42
-112M	19.8, 19.3	0.083, 0.145	0.16, 0.27
-001M	42.5, 36.9	0.19, 0.12	0.058, 0.024

Tandon's and Mitsubishi's separate measurements of the movement of the different heads produced data that appear to be in bold conflict. For instance, Mitsubishi's measurement of 16.6 micrometers for Z-axis movement on one accused device converts, according to Finding of Fact 216, to 664 [sic: 654] microinches, compared to Tandon's data showing 29 microinches for the same model. Although "facts" in judicial proceedings can be found many ways without offending the natural law, it is of small aid when two sets of scientific "facts", ostensibly measuring the same physical phenomena, show dramatically different results.

<sup>4</sup> Mitsubishi model MF 353 is stated by Mitsubishi not to have a load or pivot point. This model was not treated separately in the Commission's decision, and infringement has not been separately pressed by Tandon.

The Commission, remarking on the conflicting data, stated that it "afforded greater weight" to the Mitsubishi tests because "those tests considered the loading forces" exerted by the upper arm through the upper transducer against the disk and the lower transducer. The ALJ found that Tandon's data did not take into account these loading forces, and that failure to take these forces into account would result in flawed data. There was expert testimony to the effect that the Tandon device holds the disk flat against the lower head in the absence of the loading force, but that the Mitsubishi does not. We conclude that there was substantial evidence supporting the Commission's reliance on the Mitsubishi tests over the Tandon tests.

Based on the Mitsubishi data, and on videotapes and expert testimony, the Commission found that "the lower or first transducer of the Mitsubishi drives moves significantly during operation of the drives." The Commission further found that "the first (lower) transducer of the Mitsubishi drive does not act as a fixed positional reference for the disk as expressly required by claim 1. Rather, the first transducer in the Mitsubishi drives follows the movements of the disk, i.e., the disk is not forced to conform to the first transducer."

We uphold, as supported by substantial evidence, the factual findings of the ALJ and the Commission, who had details of the measurements and how they were obtained, and the examination and cross-examination of witnesses as to the data's genesis and significance. Based on these findings, the Commission's finding that there was no literal infringement is supported by substantial evidence, and is affirmed.

## B

Tandon argues that even if the claims are not literally infringed, they are infringed under the doctrine of equivalents. Tandon asserts that the accused devices, as compared with Tandon's claims, perform "substantially the same function in substantially the same way to obtain the same result." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 339 U.S. 605, 608, 85 USPQ 328, 330 (1950) (quoting *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 42 (1929)).

Although Mitsubishi argues that Tandon relinquished the possibility of asserting equivalency that would encompass the Mitsubishi devices because of the amendments to the claims and representations made to the PTO during prosecution of the Tandon application, Tandon is not estopped from claiming any equivalents at all. See *Mannesmann Demag Corp. v. Engineered Metal Products Co., Inc.*, 793 F.2d 1279, 1284, 230 USPQ 45, 48 (Fed. Cir. 1986) ("Amendment of claims during patent prosecution does not necessarily bar all benefit of the doctrine of equivalents"). However, claims may not be enlarged by equivalents to encompass the teachings of the prior art. *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 900, 221 USPQ 669, 678 (Fed. Cir. 1984), *cert. denied*,

469 U.S. 857 (1984). Based on Tandon's statements to distinguish the IBM prior art before the PTO, the Commission held that Tandon could not broaden the scope of its claims to include devices utilizing two non-fixed heads.

The Commission found that while the Mitsubishi devices performed the Tandon function of data transfer, they performed the function in a different way. The claimed invention, as described in the specification and in the prosecution history, transfers data utilizing one fixed head which serves as a positional reference on one side of the disk, and one gimbaled head on the other side. The accused devices transfer data utilizing two gimbaled transducers. The ALJ found that although the two Mitsubishi heads do not move to the same extent as in the IBM device, they still "follow the deviation of the floppy disk".

Tandon argues that the Commission found that both the Mitsubishi and Tandon devices suppress the large-scale waviness of the disks, and that this suppression of large-scale waviness by both devices is alone sufficient for finding infringement by equivalents. Tandon's proffered data, which compares the Z-axis movement of both devices with the much larger movement of the IBM device, supports its argument that the IBM head follows the large-scale waviness of the disk, which the other two devices suppress. Tandon thus asserts that the Mitsubishi device is much closer to the Tandon device than to the IBM device, which was the most pertinent prior art, and is within a reasonable interpretation of equivalency.

The ALJ found that the Tandon device suppresses both the large-scale and small-scale fluctuations, while the Mitsubishi device suppresses the large-scale fluctuations only, while following the small-scale fluctuations of the disk. Thus the ALJ found that the Mitsubishi device transfers data in a different way than either the IBM or the claimed devices. These findings are supported by substantial evidence. They are important factors in the determination of non-equivalence.

The ALJ cited test data to the effect "that the degree of movement in the lower head of the Tandon drive does not vary for [various brands of] media. In contrast, in the Mitsubishi drive, the degree of movement of the lower head varied by over a factor of 3:2 depending upon the type of media used. In the Tandon drive, it is the upper head alone which responds to the thickness variations and fluctuations of the media. In the Mitsubishi drive, both heads cooperate to accommodate the thickness variations and fluctuations of the media."

Both the Mitsubishi and the Tandon devices were found to remain within the "critical spacing" from the media of 0.32 microns (12.6 microinches). This spacing is the maximum distance between the media and the head that will allow accurate data transfer. It was uncontroverted that both devices achieve accurate and reliable data transfer. Even so, the ALJ found that a Mitsubishi Mark I 5¼



inch drive head moved 16.6 micrometers (664 microinches) in the normal direction, "about 50 times that of the critical spacing", and "several hundred times more than the lower head movement in the Tandon 5¼ inch drive".

This evidence supports the Commission's findings that the Mitsubishi device works in a different way from that described and claimed in the '573 patent, as the Tandon device smoothes out both the large-scale and the small-scale waviness in the movement of the disk, while the Mitsubishi device follows the small-scale waviness after smoothing out the large-scale waviness.

These findings are also consistent with the amended claim language. Claim 1 was amended to read, in part, "with the first transducer serving as a fixed positional reference despite tendencies of the media to deviate in position from its nominal plane and the second transducer matingly accommodating said tendencies by virtue of its gimbal support". The Tandon lower transducer is claimed as fixed "despite tendencies of the media to deviate", while the gimballed upper transducer follows the deviations.

Tandon's inventors, when confronted with the IBM prior art, distinguished their invention as one which suppresses both large-scale and small-scale waviness. Having successfully argued this position before the PTO, it is simply too late for Tandon to reclaim the ground which it yielded during prosecution. Since the Mitsubishi head moves along with the small-scale fluctuations of the media while remaining within the critical spacing, it falls at worst into the range that Tandon is estopped to claim. The Commission's factual findings supporting this conclusion are supported by substantial evidence.

Tandon's claimed invention suppresses small scale waviness by penetration of the fixed head into the plane of the media. The '573 specification states that "the fixed transducer is positioned to penetrate slightly into the nominal plane of the record element". The ALJ found, based on the testimony of Tandon's patent expert, that "[a]n important aspect of the '573 patent \* \* \* is that the lower head must be 'fixed' so that the media tends to conform to the head rather than the head following any pitching and rolling of the media \* \* \*." Mitsubishi witnesses Lewis and Hayashi testified to the same effect.

Tandon asserts that the Mitsubishi lower transducers also provide a positional reference for the media in the same way as the claimed device, and therefore infringe as equivalents by performing the same function in substantially the same way. There was evidence, referred to by the ALJ, that "the penetration of the Tandon drive is about five times that of the Mitsubishi drives", and that "the penetration of the lower head in the Mitsubishi devices is not sufficient to establish a physical reference for the disk". The Commission, applying prosecution history estoppel and referring to testimony, concluded that "the Mitsubishi drives, although performing

the same function, do not perform it in substantially the same way."

Tandon points out that only claims 2 and 13, not here at issue, expressly require penetration of the transducer into the plane of the disk. Invoking the doctrine of claim differentiation, Tandon argues that claims 1, 5, and 12 are not limited to devices that penetrate the plane of the disk. However, before the Patent Office the applicants stated that penetration of the plane is what provides a "reference position" for the disk, and in response to the examiner's rejection of all claims the applicants emphasized a "significant feature" of the "fixed head which serves as a positional reference." As we observed *supra*, the doctrine of claim differentiation does not allow unrestrained expansion of claims beyond the description of the invention in the specification, and explanations and representations made to the PTO in order to obtain allowance of the claims. See *Autogiro*, 384 F.2d at 399, 155 USPQ at 703-04.

Tandon also argues that the Commission's reliance on penetration by the transducer was in error in that it was based on an impermissible comparison of Tandon's commercial embodiments with the alleged infringing devices, rather than the correct procedure of applying the claims to the accused devices. *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1481-82, 221 USPQ 649, 653 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 924 (1984). The Commission, criticizing the ALJ for having made this error, explicitly disclaimed having based its final determination on a comparison of devices.

The Commission's finding is, on this record, adequately supported by substantial evidence that the way the Mitsubishi devices work is not substantially the same as that defined in the claims. Thus we affirm the Commission's determination that the Mitsubishi drives have not been proven to infringe the claims of the '573 patent literally or under the doctrine of equivalents.

#### PROCEDURAL ERROR

Tandon asserts that the Commission erred in striking Tandon's designation of and reliance on certain deposition testimony in its reply brief. Tandon had designated before the ALJ certain portions of the inventors' testimony, which designated portions were included in the record before the Commission. Tandon's argument is that after Mitsubishi filed its brief before the Commission it became necessary to enlarge the designation. This the Commission rejected as contrary to its rules, which provide that the record before the Commission shall not be enlarged beyond that before the ALJ.

The Commission did refer to the inventors' testimony in connection with its decision as to the meaning of "fixed" in the '573 specification and claims. However, Tandon has not demonstrated a sufficient basis for the extraordinary relief requested. We discern no arbitrary ruling or abuse of the Commission's discretion, and decline to require that the Commission reopen proceedings on this basis.

**AFFIRMED**



# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10007

## *Chief Judge*

Edward D. Re

## *Judges*

Paul P. Rao  
James L. Watson  
Gregory W. Carman  
Jane A. Restani

Dominick L. DiCarlo  
Thomas J. Aquilino, Jr.  
Nicholas Tsoucalas

## *Senior Judges*

Morgan Ford  
Frederick Landis  
Herbert N. Maletz  
Bernard Newman  
Samuel M. Rosenstein  
Nils A. Boe

## *Clerk*

Joseph E. Lombardi



# Decisions of the United States Court of International Trade

(Slip Op. 87-103)

EAST CHILLIWACK FRUIT GROWERS CO-OPERATIVE, PLAINTIFF *v.* UNITED  
STATES ET AL., DEFENDANTS

Court No. 85-07-00978

## MEMORANDUM AND ORDER

[Remand results affirmed; action dismissed.]

(Decided September 8, 1987)

*Bogle & Gates* (Joel R. Junker, Christopher N. Weiss and Peter L. Miller) for the plaintiff.

*Richard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Hogan*); and Office of Assistant General Counsel for Import Administration, U.S. Department of Commerce (*Eileen P. Shannon*) for the defendants.

*Kilpatrick & Cody* (Joseph W. Dorn and Anthony H. Anikeeff) for the intervenor-defendants.

**AQUILINO, Judge:** The court remanded this action to the International Trade Administration, U.S. Department of Commerce ("ITA") for further proceedings in compliance with its Slip Op. 87-16, 11 CIT —, 655 F.Supp. 499 (1987).

The ITA has submitted the results of those proceedings to which the plaintiff does not object. Having reviewed the remand results, the court finds them to be consistent with its order and notes in passing that the plaintiff is covered by the final remand results in the related case, *Washington Red Raspberry Commission v. United States*, CIT Consolidated Court No. 85-06-00789.

The results on remand are hereby affirmed, and judgment will enter dismissing this action.

SO ORDERED.

## (Slip Op. 87-104)

## WASHINGTON RED RASPBERRY COMMISSION ET AL., PLAINTIFFS v. UNITED STATES ET AL., DEFENDANTS

Consolidated Court No. 85-06-00789

## MEMORANDUM AND ORDER

[Remand results affirmed; action dismissed.]

(Decided September 8, 1987)

*Kilpatrick & Cody* (Joseph W. Dorn and Anthony H. Anikeeff) for the plaintiffs. Richard K. Willard, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (J. Kevin Hogan); and Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (Lisa Koteen) for the defendants.

Cameron, Hornbostel & Buttermann (William K. Ince) for intervenor-defendants Abbotsford Growers Co-operative Union, Jesse Processing Ltd. and Mukhtiar & Sons Packers, Ltd.

AQUILINO, Judge: The International Trade Administration, U.S. Department of Commerce ("ITA"), upon correcting four clerical errors made in the first remand proceedings and identified by the court in its Slip Op. 87-74, 11 CIT — (1987), has determined revised dumping margins for the intervenor-defendants.

None of the parties contest the methodology used by the ITA on the second remand, but the plaintiffs do object to its determination that the recalculated weighted-average margin of 0.42 percent *ad valorem* for intervenor-defendant Abbotsford Growers Co-Operative Union ("Abbotsford") is *de minimis*, thereby resulting in its exclusion from the antidumping-duty order.

The ITA recently published its rule pursuant to which *ad valorem* dumping margins of less than .5 percent will be disregarded for purposes of issuing or revoking orders or setting deposit rates. See 52 Fed.Reg. 30,660 (Aug. 17, 1987) (to be codified at 19 C.F.R. § 353.24). Independent of this rule, the ITA may make a determination that a particular margin is *de minimis*<sup>1</sup> if it is supported by substantial evidence on the record and otherwise in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(2)(B).

In reviewing the determination that the above, recalculated weighted-average margin on some Abbotsford sales of bulk-packed raspberries is *de minimis*, this court cannot conclude that it is unsupported by the record or is otherwise unlawful. As the defendants have noted, most sales reflected no underselling, notwithstanding the fact that Abbotsford was the largest exporter of the merchandise during the period in question. On its sales at less than fair value, based on the "netback" selling price range, Abbotsford realized a slight price advantage per pound. These factors, viewed in light of evidence on the record that prices for this merchandise are

<sup>1</sup> See *Carlisle Tire & Rubber Co. v. United States*, 11 CIT —, 634 F.Supp. 419, 423 (1987).

"essentially a function of supply"<sup>2</sup>, controvert plaintiffs' assertion that a margin of 0.42 percent "has a tremendous impact on the overall market for red raspberries". Plaintiffs' Comments, p. 4.

Although such an impact is conceivable under other circumstances, it is not shown here. The results of the second remand proceeding are thus hereby affirmed, and judgment will enter dismissing this action.

SO ORDERED.

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(Slip Op. 87-105)

UNITED STATES OF AMERICA, PLAINTIFF *v.* TOSHOKU AMERICA, INC., AND FEDERAL INSURANCE CO. DEFENDANTS, TOSHOKU AMERICA, INC., THIRD-PARTY PLAINTIFF *v.* CATZ INTERNATIONAL, INC., THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF *v.* SOUTHERN COMMODITIES, INC., FOURTH-PARTY DEFENDANT.

Court No. 84-11-01590

Before TSCOUALAS, *Judge*.

[Plaintiff's motion for summary judgment granted; defendants' cross-motion for summary judgment denied.]

(Decided September 14, 1987)

*Richard K. Willard*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Kenneth N. Wolf*) for the plaintiff.

*Fitch, King and Caffentzis* (*Peter J. Fitch*) for the defendants, Toshoku America, Inc. and Federal Insurance Co.

#### MEMORANDUM OPINION AND ORDER

TSCOUALAS, *Judge*: The Government commenced this action in accordance with 28 U.S.C. § 1592(2) to recover unpaid liquidated damages assessed under defendants' entry bond for failure to export diseased tuna. Defendants claim that Customs failed to comport with the regulatory scheme and thus, the government is prevented from asserting this claim. The matter is before the Court on the parties' cross-motions for summary judgment.<sup>1</sup> Alternatively, defendants argue that summary judgment in plaintiff's favor cannot be granted as factual issues relate to plaintiff's claim.

#### BACKGROUND

On May 23, 1978, the importer, Toshoku, as principal, and Federal Insurance Co. (Federal) as surety, executed and delivered to Customs a GENERAL TERM BOND FOR ENTRY OF MERCHAN-

<sup>2</sup> Results of Second Remand Proceeding, p. 6.

<sup>1</sup> The third party and fourth party derivative claims are not presently before the Court for disposition.

DISE. The bond provided for the conditional release of the merchandise before its right of admission was determined by imposing certain obligations on the principal. In the case of merchandise found not to comply with the law governing its admission, Toshoku guaranteed: (1) to redeliver to Customs upon demand any such merchandise (§4 of the bond); and (2) after proper notice, *inter alia*, to export the merchandise, and perform any other act lawfully required (§7 of the bond). In the event of default of any of these conditions, defendants guaranteed to be liable, jointly and severally, for liquidated damages equal to the value of the entered merchandise (\$30,636.00) plus the amount of estimated duties (\$1,838.16).

On October 10, 1978, Toshoku imported 1300 cartons of tuna which were covered by the aforementioned entry bond. Pursuant to § 801(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 381(a); the FDCA), the FDA sampled the merchandise. Since this examination revealed that the tuna appeared to be decomposed, a Notice of Detention and Hearing was issued by the FDA on October 31, 1978, informing Toshoku of the same. On December 12, 1978, a Notice of Refusal of Admission was sent stating that the tuna was in violation of § 801(a)(3) of the FDCA, as it appeared to be decomposed. That notice, which was signed for the District Director of Customs, directed Toshoku to export the merchandise under Customs supervision, within 90 days of the notice, or risk destruction of the goods. The entries covering these goods were liquidated on December 29, 1978.

Since Toshoku failed to export or destroy the goods, three months later, on March 16, 1979, Customs informed Toshoku that it was proceeding with a liquidated damage claim and on May 7, 1979, issued a notice of liquidated damages incurred and demand for payment. Customs based this claim on Toshoku's failure to redeliver the prohibited merchandise to Customs custody in violation of §4 of the bond. However, Customs had failed to timely issue a demand to redeliver, a condition precedent to enforcing this provision. Therefore, this claim was cancelled on March 19, 1981. Concurrent with the cancellation of that claim, Customs asserted a new claim for liquidated damages based on Toshoku's failure to export the goods in violation of §7 of the bond, accompanied by another demand for payment, dated March 9, 1981, which was also forwarded to the surety, Federal. Toshoku unsuccessfully petitioned for relief from this second claim and on August 9, 1984 a further demand for payment was made against the surety. To this date neither defendant has paid the liquidated damages and there has been no proof submitted that the merchandise was ever exported or destroyed.

The government claims that Toshoku failed to export the prohibited merchandise as directed, which constitutes a breach of §7 of the bond, thus obligating the defendants to pay liquidated damages. Defendants concede that the merchandise was never exported or destroyed but by way of affirmative defenses, maintain that they are

not in breach of the bond. Defendants contend that if goods have been released by Customs, and are later found to be inadmissible, Customs must reacquire control or custody over the goods, by demanding redelivery; absent this demand, Customs cannot enforce a claim for failure to export. Defendants allege that there is no bond obligation under ¶7 to export prohibited merchandise, unless the importer seeks to bring the goods into compliance by exporting the nonconforming part of the shipment; and furthermore, proper notice as contemplated by ¶7 of the bond was not provided.

#### DISCUSSION

In accordance with 21 U.S.C. § 381(a), the Secretary of Health and Human Services (FDA) shall sample all food offered for importation and if it appears from such examination that the food is adulterated it shall be refused admission. The Secretary of the Treasury (Customs) shall cause the destruction of any such merchandise unless exported under Customs regulations within 90 days of the date of the notice of refusal or within such additional time that may be permitted. Under § 381(b), pending the decision on admissibility by the FDA, the merchandise may be delivered to the importer, if he has executed a bond providing for the payment of liquidated damages in the event of default. This subsection further allows for the reconditioning of merchandise to rectify any non-compliance.

It is clear that any adulterated food refused admission must be exported or destroyed, S. Rep. No. 890, 81st Cong., 1st Sess. (1949) *reprinted in*, 1949 U.S. Code Cong. Service, 2147; although, it is the importer who exercises the option to export rather than have the goods destroyed. *Carl Borchsenius Co. v. Gardner*, 282 F. Supp. 396, 402 (E.D. La. 1968). Nevertheless, when the defendants executed the bond in question, they entered into a contract with the government thereby agreeing to perform the conditions enumerated therein. See *United States v. Atkinson*, 6 CIT 257, 260, 575 F.Supp. 791, 794 (1983). One of these conditions was to export (or destroy) merchandise found not to comply with the laws governing its admission. The question is whether this obligation may not be enforced against defendants because Customs conditionally released the goods, and whether the only method Customs has to enforce the FDA decision is first demand redelivery and then require exportation.

Defendants stress that both the FDA and Customs regulations require redelivery of prohibited goods. 19 C.F.R. §§ 12.1-12.5 specifically apply to the importation of food, drugs, and cosmetics, which is governed by 21 U.S.C. § 381. 19 C.F.R. § 12.4 provides that any such merchandise refused admission shall be exported under Customs supervision in accordance with 19 C.F.R. §§ 18.25 and 18.26. However, neither regulation makes any mention of redelivery to Customs custody. Section 18.25<sup>2</sup> provides:

<sup>2</sup> Section 18.26 provides for indirect exportation, i.e., transport to another port before exportation.

(a) \* \* \* when no entry has been made or completed for merchandise in *Customs custody*, or when the merchandise is covered by an unliquidated consumption entry, or when merchandise which has been entered in good faith is found to be prohibited under any law of the United States, and such merchandise is to be exported \* \* \* [emphasis added].

The remainder of § 18.25(a) outlines the actions necessary for direct exportation of the merchandise. The above quoted language does not support defendants' conclusion that this provision presumes that the merchandise has already been returned to Customs custody before those procedures are undertaken. The term in *Customs custody* is not used to modify the last clause in that sentence and demonstrates that exportation shall be effected under this regulation when the merchandise is prohibited, or when it is in Customs custody. Further, under § 18.25(e) the principal on any bond who guaranteed exportation shall cause the merchandise to be exported, and as required under § 113.55 (which authorizes the cancellation of the bond upon proof of exportation such as: listing the merchandise on the outward manifest or bill of lading), shall provide such evidence of exportation to Customs.

Defendants emphasize that under 19 C.F.R. § 141.113 the District Director shall demand the return of merchandise refused admission to Customs custody, before liquidation of the entry has become final.<sup>3</sup> It is argued that if the importer could just be ordered to export or destroy, what is the purpose of including the requirement of redelivery. While redelivery is not explicitly defined in the regulations, Congress has stated that:

\* \* \* a demand for redelivery (or a "constructive seizure"[D]) to Customs custody is in reality no different than a decision to exclude merchandise from entry or delivery—a decision which the Customs Court may now review. The only difference \* \* \* is the time when the decision is made by the Customs Service. The decision to exclude is made at the time an entry is attempted. A demand for redelivery is made after the goods have already entered but the Customs Service subsequently decides that the goods should not have been allowed into the commerce of the United States in the first instance.

S. Rep. No. 466, 96th Cong., 1st Sess. 7 (1979).

Therefore, the demand for redelivery in its primary focus, is necessarily used when Customs subsequently determines that goods should be excluded. As this Court iterated in *United States v. Utex Int'l Inc. and Sentry Ins. Co.*, 11 CIT —, — 659 F. Supp. 250, 253 (1987), appeal docketed No. 87-1414 (Fed. Cir. June 17, 1987), there are certain decisions to exclude merchandise, not related to the importation of food, which are inherently within the jurisdiction of Customs. However, the decision to exclude contaminated food is

<sup>3</sup> 21 C.F.R. § 1.97 states that a bond required by 21 U.S.C. § 381 shall contain a provision for redelivery upon demand and a provision for the performance of those conditions which may lawfully be imposed to bring the article into compliance.



solely within the discretion of the FDA. *Sugarman v. Forbragd*, 405 F.2d 1189 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). Customs does not decide the admissibility issue but merely enforces the FDA decision. *Utex*, 11 CIT at —, 659 F. Supp. at 252. Therefore, when as here, the FDA determines the goods should be excluded, the demand for redelivery is not necessarily the *sine qua non* to direct exportation. However, if the importer fails to export the merchandise which was denied admission, it is recognized that a demand for redelivery is used as an enforcement mechanism to prevent these goods from entering the commerce of the United States.<sup>4</sup>

Notwithstanding that these regulations contemplate that the importer shall export the prohibited goods without a demand for redelivery, defendants deny any obligation to export referring to the purposes of each bond condition in issue. The basic import and entry bond conditions enumerated in 19 C.F.R. § 113.62 shall be incorporated in any bond covering the release of food (*see* 19 C.F.R. § 12.3). In relevant part these conditions are:

(d) \* \* \* If merchandise is released conditionally from Customs custody to the principal before all required evidence is produced, before its quantity and value are determined, or before its right of admission into the United States is determined, the principal agrees to redeliver timely, on demand by Customs, the merchandise released if it:

(1) Fails to comply with the laws or regulations governing its admission into the United States;

\* \* \* \* \*

[Any demand for redelivery will be made within 30 days after the release of the merchandise or 30 days after the conditional release period, whichever is later.]

(e) *Agreement to Rectify Any Non-Compliance with Provisions of Admission*. If merchandise is released conditionally to the principal before its right of admission into the United States is determined, the principal, after notification, agrees to mark, clean, fumigate, destroy, export or do any other thing to the merchandise in order to comply with the law and regulations governing its admission into the United States within the time period set in the notification.

Apparently ¶4 of the bond refers to § 113.62(d) and ¶7 incorporates § 113.62(e). It is claimed that ¶7 does not apply in this situation where the entire shipment was refused admission and no permission was sought under 21 U.S.C. § 381(b) to rectify the noncompliance (by exporting the goods). Defendants claim that when goods are refused admission under § 381(a), the only consequence for electing not to export, is destruction of the goods. There is nothing to suggest, however, that § 113.62(e) only covers situations in 21

<sup>4</sup> In recognizing the serious threat that merchandise denied admission by the FDA may still enter the commerce of the United States, by virtue of the New York Region Informational Pipeline No. 928 (May 14, 1984), a policy was established of demanding physical redelivery of the goods, where all subsequent options by the importer (to export or destroy) would occur thereafter under Customs supervision. Contrary to defendants' interpretation, the Court views this to mean that previously no initial demand for redelivery was required.

It is noted that the time limits for demanding redelivery under § 141.113, *supra*, are different from those imposed pursuant to § 113.62 *infra*, under the bond.

U.S.C. § 381(b), or that it excludes a situation where the entire entry is denied admission. The FDA instructed Toshoku to export the goods within 90 days, in order to comply with the laws governing its admission, as per 21 U.S.C. § 381(a), and the Court finds this within the parameters of § 113.62(e).

Defendants have not cited any case law in support of their position, while reference to those cases which have addressed the issue of bond liability, would tend to defeat their argument. *See, e.g., United States v. India Food and Gourmet, et al.*, 9 CIT 171, 176 (1985) (similarly, no notice to redeliver issued but court held that "Customs' effort to collect damages for failure to export (or destroy) after first seeking damages for failure to redeliver was a valid action under the bond"); *United States v. Imperial Food Imports, et al.*, 11 CIT —, —, 660 F. Supp. 958, 960 (1987) (defendant was obligated to pay liquidated damages where the refused goods were not exported, destroyed, or redelivered), *appeal docketed* No. 87-1330 (Fed. Cir. May 7, 1987); *United States v. B.B.S. Electronics Int'l Inc., et al.*, 9 CIT 561, 567, 622 F. Supp. 1089, 1095 (1985) (although importer instructed to deliver goods to Customs after refused admission, court held "it is undisputed that pursuant to paragraph 7 of the bond, BBS agreed to export the [merchandise] under Customs supervision").

While defendants urge that liquidation of the entries herein constitutes a bar to Customs action against the bond, the Court is not persuaded that its recent decision to the contrary in *Utex, supra*, is erroneous. As stated in *Utex*, the importer's liability imposed by liquidation for import duties is in addition to the obligation to export the prohibited merchandise. 11 CIT at —, 659 F. Supp. at 253. Under 19 C.F.R. § 159.55(a) suspension of liquidation is required for entries covering merchandise subject to § 12.1 (imported food) until the decision is made as to its admissibility. Even though the goods were refused, liquidation of these entries was still valid under this regulation since it occurred after the admissibility decision was made. *See United States v. A.N. Deringer, Inc.*, 66 CCPA 50, 54, C.A.D. 1220, 593 F.2d 1015, 1019 (1979). Furthermore, under § 159.55(b) if the merchandise is exported under Customs supervision in accordance with § 158.45(b) or destroyed in accordance with § 158.41, any duties paid shall be refunded. Moreover, §§ 158.41 and 158.45(b) and (c) address merchandise which is either denied admission by any government agency or has been found to be prohibited under any law *after its release from Customs custody* and permit its destruction or exportation (in accordance with §§ 18.25-18.27) under Customs supervision. The regulations clearly contemplate that neither release from Customs custody nor liquidation poses a bar to recovery.

Defendants further contend that the notice of refusal of admission cannot serve both to deny admission and as a notice to export under ¶ 7 of the bond, alleging that only Customs can order exporta-

tion and only the FDA can determine admissibility. The refusal of admission was signed by one Wanda Eng and under her signature reads "for DISTRICT DIRECTOR OF CUSTOMS". Other FDA forms submitted with the parties' motions contain her signature and her title as Compliance Officer, apparently from the FDA. Defendants submit that a factual question exists as to her authority.

There is nothing in § 381(a) or in the Customs or FDA regulations that explicitly state which agency is actually to order exportation of the prohibited merchandise and nothing in the law or regulations prohibit this notice from being issued by the FDA. The Court does not consider it of consequence that this notice was signed for the District Director of Customs considering that under 21 U.S.C. § 371 and 19 C.F.R. § 12.1, there is cooperation between the two agencies when supervising the importation of food.

The notice merely reiterated the language of 21 U.S.C. § 381. Since there is no specific law or regulation which mandates that the notice to export must be duly generated from Customs or the FDA, the question then is whether this notice was reasonable. Clearly, the importer received actual notice that the entry was refused and what must be done to these goods which have been found not to comply with the laws governing its admission.<sup>5</sup> Defendants never challenged the FDA findings or the notice of refusal of admission as not lawfully authorized. Although defendants question what constitutes the actual notice alleging that the notice submitted with plaintiff's motion is really a collage of documents, this contention is without merit as: (1) defendants have not claimed that the importer did not receive this notice; (2) this form was certified to be a true and accurate copy of the document; and (3) as plaintiff states, the original was supplied to the importer. The Court considers this notice, afforded defendants, to be proper, and in light of the above discussion does not raise a triable issue which would preclude summary judgment in plaintiff's favor.

The government seeks both pre-judgment and post-judgment interest. Plaintiff shall be awarded post-judgment interest in accordance with 28 U.S.C. § 1961. *Imperial Food Imports*, 11 CIT at —, 660 F. Supp. at 961; *B.B.S. Electronics*, 9 CIT at 567, 622 F. Supp. at 1095. As stated in *Utex*, the rate in subsection (c) of § 1961 is not applicable to this type of action. 11 CIT at —, 659 F. Supp. at 254. The Court also rejects defendants' request to delay imposition of this award for ten days after entry of the final judgment, as there is no justification for such action.

The decision as to whether pre-judgment interest is warranted is within the court's discretion as no statute specifically provides for this award. *Atkinson*, 6 CIT at 262, 575 F. Supp. at 795; accord *B.B.S. Electronics*, and *Imperial Food Imports*, *supra*. "In determining the propriety of such an award, any laxity on the part of plain-

<sup>5</sup> It is noted that documentation submitted with Toshoku's third party claim states that any party who purchased the diseased goods must re-export them and provide proof of such exportation. This point is raised to dispel any notion that defendants were not aware that the notice of refusal of admission also properly directed exportation.

tiff in pursuing its claim is to be considered." *Utex, supra*. In *Imperial Food Imports*, pre-judgment interest was awarded from the date of the final demand for payment, and in *Utex*, this Court granted pre-judgment interest from the date when defendant's petition for mitigation of the claim was denied.

The goods were refused admission in December 1978. The first demand for payment based on the claim presently before the Court, was made on March 19, 1981. This followed with a lengthy administrative review of Toshoku's petition for relief (see 19 C.F.R. § 172.1 *et seq.*, and 21 C.F.R. § 1.98), which culminated in denying mitigation of the claim. On August 9, 1984, an additional demand for payment was made on Federal, the surety. The facts and circumstances as presented in this case warrant pre-judgment interest from the date of this demand. Notwithstanding the Court's recent position in *Utex*, this appears to be the first time a formal demand was made on the surety. Clearly, the government was entitled to payment at this time. The rate of pre-judgment interest shall be in accordance with 26 U.S.C. § 6621. Finally, the amount sought (\$32,474.16), is the sum of the value of the merchandise plus the estimated duty thereon, as provided by the bond. However, the entry has been liquidated and the duty has been tendered. Therefore, the amount recoverable shall be limited to the value of the merchandise, \$30,636.00.

#### CONCLUSION

Defendants are liable to the government for liquidated damages pursuant to their entry bond for failure to export contaminated food. This claim is not precluded by Customs failure to issue a demand for redelivery. The notice of refusal of admission is not improper merely because it was issued by the FDA for Customs, it apprised the importer of its responsibility to export. Plaintiff has established that it is entitled to summary judgment. However, the amount recoverable shall be limited to the value of the merchandise, \$30,636.00, as the goods have already been liquidated. Defendants shall pay post-judgment from the date of the judgment and pre-judgment interest from August 9, 1984.

SO ORDERED.

(Slip Op. 87-106)

THE NATIONAL ASSOCIATION OF MIRROR MANUFACTURERS, PLAINTIFF U.  
UNITED STATES, DEFENDANT, GLAVERBEL, S.A., DEFENDANT-INTERVENOR

Court No. 87-04-00592

Before DiCARLO, Judge.

[Motions to strike granted.]

(Decided September 15, 1987)

*Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart and James R. Cannon, Jr.) for plaintiff.*

*Richard K. Willard, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Department of Justice, (Jeanne E. Davidson); Paul C. Aiken, Office of the Deputy Chief Counsel for International Trade, Department of Commerce, for defendant.*

*Ulmer, Berne, Laronge, Glickman & Curtis (Morton L. Stone and Ronald H. Isroff) for defendant-intervenor.*

DiCARLO, Judge: The National Association of Mirror Manufacturers, plaintiff, and the United States, defendant, each move to strike the second and third sentences of paragraph 12 and the third request for relief contained in the answer of defendant-intervenor Glaverbel, S.A. Plaintiff and defendant argue that these portions of defendant-intervenor's answer amount to an untimely cross-claim over which this Court does not have jurisdiction.

Since the claim raised by defendant-intervenor in its answer does not comport with the time limitations imposed by section 516A(a) of the Tariff Act of 1930 (Act), as amended, 19 U.S.C. § 1516a(a) (Supp. III 1985), the Court finds it does not have jurisdiction to consider such claim. The Court grants the motions to strike.

The United States Department of Commerce, International Trade Administration (Commerce) published in the Federal Register on March 12, 1987 an amended final affirmative determination that unfinished mirrors from Belgium were being sold in the United States at less than fair market value. *See Amendment to Final Determination of Sales at Less Than Fair Value; Mirrors in Stock Sheet and Lehr End Sizes From Belgium*, 52 Fed. Reg. 7634 (March 12, 1987). On March 19, 1987, the United States International Trade Commission (Commission) published its determination that the mirror industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports of certain unfinished mirrors from Belgium. *See Certain Unfinished Mirrors from Belgium*, 52 Fed. Reg. 8656 (March 19, 1987).

Defendant-intervenor did not challenge either of these determinations, but moved on June 2, 1987 to intervene as a matter of right in the timely action brought by plaintiff as an interested domestic party challenging both determinations. In an answer filed simulta-

neously with the motion to intervene, defendant-intervenor claims: "[T]he low dumping margin of 0.97% arrived at by the ITA [Commerce] in its final determination is *de minimis* under law and under the facts and circumstances of this case. Therefore, the ITA should have arrived at a final negative determination of dumping with respect to unfinished mirrors produced by Defendant-Intervenor Glaverbel and exported to the United States." Defendant-intervenor's answer, page 4, paragraph 12.

Plaintiff and defendant argue that this claim made by defendant-intervenor in its answer disputes rather than supports the legal and factual basis of Commerce's final determination and therefore a motion to strike should be granted because the claim is beyond the statutory time limits for bringing such an action provided in section 516A(a) of the Act, as amended, 19 U.S.C. § 1516a(a).

According to defendant-intervenor, it would be a waste of time and resources for a foreign interested party to appeal an unfavorable, affirmative Commerce determination after a favorable, negative Commission determination, quoting from *Bethlehem Steel Corp. v. United States*, 742 F.2d 1405, 1410 (Fed. Cir. 1984):

After the notice's issuance, there still remained one last requirement before a countervailing duty order could issue—the ITC's final injury determination. If the ITC had found no injury, the investigation would have been terminated, and no countervailing duty order would have been promulgated. The decision below requires, however, an interested domestic party to appeal from the ITA determination even though shortly thereafter the whole question of duty assessment could become moot because the ITC found no domestic injury whatever. It is highly unlikely that Congress would call for such a potentially useless appeal."

In *Bethlehem Steel*, the court found that the contested portion of an affirmative determination was not itself a negative determination that should be appealed 30 days after issuance pursuant to 19 U.S.C. § 1516a(a)(A)(i) & B(ii) (1982) (amended Supp. III 1985), but rather was a negative aspect of an affirmative determination timely challenged 30 days after issuance of the countervailing duty order pursuant to 19 U.S.C. § 1516a(a)(2)(A)(ii) & B(i) (1982) (amended Supp. III 1985). Although the *Bethlehem Steel* Court confronted the question of what type of action was brought, the court accepted that the action however characterized must be brought within the jurisdictional time limits prescribed by Congress.

Upon consideration of the present motions, the Court finds that the claim raised by defendant-intervenor in its answer is a challenge to Commerce's final affirmative determination. The defendant-intervenor is asserting that Commerce should have made a negative determination by finding the 0.97% dumping margin *de minimis*. Congress provided that a challenge to an affirmative determination of Commerce followed by a negative Commission deter-



mination must be brought 30 days after notice of the Commission's final negative determination in the Federal Register pursuant to 19 U.S.C. § 1516a(a)(3) (Supp. III 1985). See 28 U.S.C. § 2636(c) (Supp. III 1985).

Although defendant-intervenor's position that it is wasteful of time and resources for it to challenge an affirmative Commerce determination followed by a negative Commission determination may have some merit, there are cases in which it was beneficial to the foreign interested party to contest an affirmative Commerce determination despite a negative Commission determination. See *Canadian Meat Council v. United States*, 10 CIT —, 644 F. Supp. 1125 (1986); *Intenor Trade, Inc. v. United States*, 10 CIT —, 651 F. Supp. 1456 (1986).

In evaluating the motions to strike, the Court must adhere to the strict standards which govern its jurisdiction. As stated by our appellate court in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986):

Since section 1516a(a)(2)(A) [a jurisdictional provision like 19 U.S.C. § 1516a(a)(3)] specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions \* \* \*. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit." [Citations omitted].

The defendant-intervenor here makes a claim that challenges Commerce's affirmative determination through an answer filed almost two months beyond the end of the 30 day statutory deadline for challenging an affirmative Commerce determination following a negative Commission determination provided by 19 U.S.C. § 1516a(a)(3). It has been held consistently that a court lacks jurisdiction over a challenge to a Commerce determination brought by an intervenor which does not comport with the time limitations imposed by 19 U.S.C. § 1516a(a). *Nakajima All Co. v. United States*, 2 CIT 170 (1981); *Fuji Electric Co. v. United States*, 7 CIT 247, 595 F. Supp. 1152, appeal dismissed, No. 84-1639 (1984); *East Chilliwack Fruit Growers Co-operative v. United States*, 11 CIT —, 655 F. Supp. 499, 504-505 (1987); *Washington Red Raspberry Comm'n v. United States*, 11 CIT —, 657 F. Supp. 537, 545-546 (1987). The Court holds that it lacks jurisdiction over the claim raised by defendant-intervenor through an answer filed after the statutory time limit of 19 U.S.C. § 1516a(a)(3).

Defendant-intervenor attempts to distinguish the cases cited above by arguing that these cases deal with cross-claims which would have unduly enlarged the pleadings and thereby prejudiced the parties involved. In this action, defendant-intervenor contends, the claim it makes would not unduly enlarge the pleadings since



the determination by Commerce is already placed in issue by plaintiff's complaint.

The Court is not persuaded that in the cases cited the decision to exclude the claim raised by the intervenor was based on a finding that such claim would unduly enlarge the pleadings. Even if the Court were so persuaded, the defendant-intervenor would not benefit since the Court finds the claim raised by defendant-intervenor in this action would unduly enlarge the pleadings.

The Court does not find any reference to the *de minimis* issue in either plaintiff's complaint or defendant's answer. The purpose of the challenge to Commerce's determination is to increase the dumping margin, not to reverse Commerce's affirmative determination.

As the court in *Fuji Electric* concluded, the intervenor must take the action "as it has been framed by the parties therein." 7 CIT at 249, 595 F. Supp. at 1154. Here defendant-intervenor in an answer filed after the jurisdictional time limits of 19 U.S.C. § 1516a(a)(3) attempts to inject a claim subject to such jurisdictional provision which the Court finds beyond the scope of the pleadings of the other parties. The Court holds that it does not have jurisdiction to consider this claim. The Court grants the motions to strike the second and third sentences of paragraph 12 and the third request for relief contained in defendant-intervenor's answer.

SO ORDERED.

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(Slip Op. 87-107)

BASF WYANDOTTE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-03-00363

[Judgment for plaintiff.]

(Decided September 21, 1987)

*Barnes, Richardson & Colburn* (James S. O'Kelly), for plaintiff.

*Richard K. Willard*, Assistant Attorney General; *David; M. Cohen*, Director, Commercial Litigation Branch (*Susan Handler-Menahem*), Civil Division, United States Department of Justice, for defendant.

#### OPINION

**RESTANI, Judge:** This matter is before the court for decision following trial on June 23 and 24, 1987. The basic issue is whether imported merchandise marketed under the trade name "Bafixans" are inks or dyes for tariff purposes. The merchandise was imported between 1979 and 1981. Depending on the date of importation, the merchandise was classified by the United States Customs Service (Customs) under either item 406.50 of the Tariff Schedules of the United States (TSUS) or items 409.90-92, TSUS.

Item 406.50, TSUS (1980) reads as follows:

Color, dyes and stains (except toner), whether soluble or not in water, obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part [part 1].

Part 1 of Schedule 4 of TSUS is entitled "BENZENOID CHEMICALS AND PRODUCTS." Subpart A is entitled "Organic Chemical Crude." Subpart B is entitled "Industrial Inorganic Crude." There is no dispute that the merchandise at issue is derived from products provided for in one of the relevant subparts of part 1.

After July 1, 1980, item 406.50 was eliminated from the TSUS, and Bafixans were classified under items 409.90-92, TSUS which added to the above quoted language of item 406.50, the additional words:

Other:

409.90 Products provided for in the Chemical Appendix to the Tariff Schedules.

409.92 Other.

Plaintiff argues that Bafixans are not dyes and may not be classified under either item 406.50 or items 409.90-92 as dyes, but rather that they are inks and should be classified under item 474.26 in part 9 of Schedule 4, TSUS. Headnote 1 to Part 9 indicates that products classifiable under both Parts 1 and 9 should be classified under Part 1 except " \* \* inks". Item 474.26, TSUS (1980) reads:

Inks and ink powders:

\* \* \* \* \*

Other inks

Defendant makes two responses: 1) As a factual matter Bafixans are dyes and 2) even if they are actually inks, Congress has manifested an intent that they be classified as dyes. The following are separate discussions of these issues.

#### RATIFICATION OF PREVIOUS PRACTICE

Defendant argues that if Customs' previous practice of classification of Bafixans under item 406.50 was erroneous, such practice has been ratified by Congress through the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (Act). As of July 1, 1980, American Selling Price (ASP) valuation of products classified under item 406.50 was repealed by § 201(b) of the Act. See headnote 4 of Part 1, Schedule 4, TSUS (1980) (repealed by § 223(d) of the Act). Defendant cites to various excerpts from the legislative history of the Act, most notably S. Rep. No. 249, 96th Cong., 1st Sess. 126-27, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 512-513, which reads in part:

The bill—Sections 222 and 223 would convert the rate of duty applicable to certain articles in the TSUS which are on the Final List or are valued on an ASP basis to a rate providing

equivalent duty receipts if the article were valued not under existing section 402a or on an ASP basis, but rather on the basis of the existing section 402 of the Tariff Act of 1930.

\* \* \* \* \*

The nomenclature and rates of duty contained in sections 222 and 223 for merchandise currently subject to the ASP method of valuation and for certain merchandise currently subject to valuation under section 402a are designed to insure that U.S. industries producing the merchandise in question will receive protection under that nomenclature and rates of duty that is substantially equivalent to the protection they receive from present rates of duty applied on appraised value determined under present U.S. law.

Defendant cites similar language in H.R. Rep. No. 317, 96th Cong. 1st Sess. 88, 94-95 (1979).

Other provisions of the Act, notably sections 224, 225 and 503(a), allowed the President, in order to meet international commitments, to promulgate changes to the tariff schedules that would lower duties on some products. Section 503(a), in particular, allowed products otherwise classifiable under, *inter alia*, item 409.90 to receive duty rate reductions that would have violated previous statutory limits on such reductions, provided the products were not imported into the United States prior to January 1, 1978 and not produced in the United States before May 1, 1978.

Pursuant to such authority the President did alter the tariff schedules and did issue a list of certain products, imported prior to January 1, 1978 or produced in the United States prior to May 1, 1978, which comprise the Chemical Appendix to the Tariff Schedules. Proclamation No. 4768, 45 Fed. Reg. 45135, (June 28, 1980), reprinted in 1980 U.S. Code Cong. and Admin. News 7434. Accordingly, the scope of item 409.90 was limited to dyes listed in the Chemical Appendix, and the remaining dyes, not listed in the Appendix and thereby excluded from 409.90, were to be classified under item 409.92. See *id.*

The Proclamation itself and Annex II thereto, which contains the Chemical Appendix, make no mention of any desire to affect principles governing the classification of dyes and inks. Nor is there any language in the legislation or the legislative history cited by defendant which indicates that Congress intended the President to make such a change. The Chemical Appendix, which was published after the enactment of the Trade Agreements Act of 1979, merely lists the relevant chemicals that were imported into the United States before 1978 (or produced here prior to May 1, 1978). Apparently some Bafixans are listed there because they were previously classified by Customs under item 406.50, not because any decision was made that they are properly classifiable as dyes. Presumably, if the product is not a dye it is not in the competitive position which Congress intended to affect by the legislation discussed here. Only if Bafixans are listed in the Chemical Appendix and they also meet

the definition of dyes may they be classified under item 409.90, TSUS. If a particular Bafixan is not listed in the Chemical Appendix it may be classified under 409.92, TSUS, only if it is also a dye.

#### INKS VERSUS DYES

The facts stipulated by counsel before trial and the testimony at trial revealed the following about Bafixans: Bafixans consist of highly concentrated coloring agents, dispersing agents which also serve as binders, other chemicals (such as preservatives), and water. Bafixans were invented in recent years for use in the textile industry. Specifically, Bafixans are designed for and are sold to companies who print transfer paper with the Bafixans. The transfer paper is used in a subsequent heat transfer process whereby the coloring in the Bafixans gasifies (sublimes) and is imparted to textiles. Bafixans are relatively expensive when compared with ordinary inks and dyes. Bafixans are not used for direct dyeing of textiles, although one can dye textiles with them if one wishes to expend money unnecessarily. There was no testimony, however, that the resulting degree of color achieved by dyeing directly with Bafixans or the color fastness achieved by such a process was commercially acceptable. Similarly, although Bafixans are not used to print ordinary paper, because less expensive products are available for this purpose, one may print ordinary paper with Bafixans after adding a sufficient amount of water.

As the type of heat transfer of colorant from paper to textiles at issue here is a fairly recent process, it does not appear to have been specifically contemplated by the drafters of the TSUS. Nonetheless, as is usual in tariff classification, if Bafixans fit the definition of either inks or dyes they will be classified as such.

There was little testimony as to what constitutes a dye. Defendant's one witness testified that he treated the Bafixans as dyes for ASP purposes, but he did not appear qualified to provide a useful definition distinguishing inks from dyes and he did not attempt to do so. Defendant's case basically rests on two types of evidence tending to demonstrate that Bafixans are known as "dyes" to the relevant industry. It is absolutely indisputable that the manufacturer has referred to Bafixans as dyes. The court is not persuaded by such evidence, however, that Bafixans are indeed dyes. Bafixans are sold to the textile industry and "dye" is the word used by that industry. Witnesses testified that when people with a printing industry background use Bafixans they often call them inks. Similarly, the Color Index, an excerpt from which was placed in evidence, lists Bafixans as "Disperse dyes for aqueous printing of dry heat transfer printing papers." This somewhat qualified description of Bafixans, standing alone without any testimony as to why Bafixans are listed in this manner, is not very persuasive.

The most persuasive witness in the case was Mr. Harvey George, Director of the Gravure Technical Association. Mr. George was

well-qualified to give his opinion that the merchandise was ink. He testified that Bafixans contain all of the components of ink and function as ink would in a press designed to print with ink, as he confirmed through experiment. The government argues that because a great deal of water is added before Bafixans are press-ready for use, in the type of ordinary printing that Mr. George performed and in transfer printing, that Bafixans cannot be inks. This argument fails in light of *Corporation Sublistatica, S.A. v. United States*, 1 CIT 120, 511 F. Supp. 805 (1981). In that case, ink powders that are also used in print transfer paper, were classified by Customs as dyes. The court found that dyes are colorants and that inks contain colorants, binders and solvents.<sup>1</sup> In the *Sublistatica* case the non-water solvent was missing from the ink powder. The court found that the product would be classified as an unfinished ink, rather than a dye, but for the existence of a specific provision for ink powder. The total absence of solvent did not persuade the court in *Sublistatica* that the merchandise was a dye. Nor does the absence of some solvent here convince the court that Bafixans are dyes.<sup>2</sup> Furthermore, Mr. George testified that water is often added to make press-ready inks for ordinary printing purposes. He referred to Bafixans as "bulk" or "virgin" inks. The court is reluctant to base classification on the mere addition of water by the simple process of stirring or shaking unless the TSUS or legislative history makes clear that such a distinction is intended. There is no such indication here.

Next, defendant argues that the dispersing agents which have binding properties are not "binders." Defendant presented no testimony that ingredients which perform binding and dispersing functions are not binders. Dr. Manfred Gaeng, who was well-versed in the technology of the composition of Bafixans and the properties of the component products, testified that the particular dispersing agents used in Bafixans were chosen for their particular binding qualities. In the process involved here the colors must be bound to the paper, but they must also be capable of leaving the paper and transferring to the textile. Too strong a bond would not be desirable. Mr. George testified, however, that in his experiment the color was bound to the paper in much the same degree that is achieved by using ordinary ink. There was also testimony that, after the heat transfer process is complete, some color remains bound to the paper and the transfer paper is then sold as wrapping paper.

Next, defendant points to testimony which demonstrates that thickeners are usually added when Bafixans are used to print transfer paper. The thickeners have binding properties, but by itself the addition of "more binder" does not prevent Bafixans from being inks. It was also asserted, however, that the amount of binders present in Bafixans distinguishes this case from *Sublistatica* Ap-

<sup>1</sup> Mr. George utilized this definition in his testimony and recognized it as a long-standing printing industry definition.

<sup>2</sup> *Sublistatica* also disposes of any argument that a product is a dye simply because its ultimate purpose is to color textiles.

proximately 25% of the ink powder in *Sublistatica* was binder. If water is excluded, for comparison purposes with the dry ink powder of *Sublistatica*, the dispersing-binding agent on average comprises approximately 10% of the Bafixan. The defendant presented no credible testimony which would cause the court to conclude that this percentage difference distinguishes Bafixans from the *Sublistatica* product. To the contrary, the court is persuaded by the testimony presented that Bafixans contain sufficient binder and solvent to be ink under the *Sublistatica* and the printing industry definition of ink.

There was some additional testimony which supports a finding that Bafixans are not simply disperse dyes. For example, the colorant in Bafixans is milled to a finer consistency than that of ordinary disperse dyes. In addition, Bafixans are non-ionic, while ordinary textiles dyes are more commonly anionic.

As announced at the conclusion of trial, the court finds many of the issues in this case were settled in *Sublistatica* and that the testimony of plaintiff's witnesses overwhelmed the documentary evidence of trade description which defendant was able to uncover. Although Bafixans do not fit easily into ordinary notions of either dyes or inks, the testimony clearly established that Bafixans fit the relevant industry definition of ink and perform as inks do.

Accordingly, judgment is entered for plaintiff.

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# ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C87/138	Newman, S.J. August 24, 1987	Phone Mate, Inc.	85-6-00742	Item 684.62 8.5%	It
C87/139	Newman, S.J. August 26, 1987	Novatronics of Canada, Ltd.	84-10-01439	Item 682.25 8.8%	It
C87/140	Newman, S.J. August 26, 1987	Novatronics of Canada, Ltd.	84-10-01440	Item 682.25 8.8%	It
C87/141	Newman, S.J. September 2, 1987	Pharmacia Inc.	85-2-00191	Item 711.88 or 712.49 8.6%, 7.5% or 7.9%	It
C87/142	Newman, S.J. September 2, 1987	Washington International Insurance Co.	84-9-01249	Item 740.14 9.9%	It
C87/143	DiCarlo, J. September 4, 1987	Isod Outerwear	82-1-00008-S, etc	Item 380.84 \$0.25 per lb. + 27.5%, or Item 379.96 \$0.16 per lb. + 24%	It

# TION DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
Item A684.62 Free of duty	Agreed statement of facts	Los Angeles Telephone hand sets
Item 682.30 4.9%	Agreed statement of facts	Buffalo-Niagara Falls Motors
Item 682.30 4.9%	Agreed statement of facts	Buffalo-Niagara Falls Motors
Item A661.95 4.7%	Pharmacia Fine Chemicals, Inc. v. U.S., S.O. 85-92	New York Columns
Item A740.14 Free of duty	Agreed statement of facts	New York Gold jewelry
Item 378.56 Various rates	Isod Outerwear v. U.S., S.O. 85-72	New York Men's 100% nylon jackets

# ABSTRACTED VALUATION D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HE
V87/282	Watson, J. August 26, 1987	Louis Goldey Co.	R66/13761, etc.	Export value	F.o.b. unit 20% of d f.o.b. unit appraised
V87/283	Watson, J. August 26, 1987	New York Merchandise Co.	R61/4192, etc.	Export value	Appraised 7.5% the
V87/284	Watson, J. August 26, 1987	New York Merchandise Co.	R65/23069, etc.	Export value	F.o.b. unit 20% of d f.o.b. unit appraised
V87/285	Watson, J. August 26, 1987	Ruby Importing Co.	R63/4895	Export value	F.o.b. unit 20% of d f.o.b. unit appraised
V87/286	Watson, J. August 26, 1987	Suncoast Merchandise Corp.	R60/2569	Export value	F.o.b. unit 20% of d f.o.b. unit appraised
V87/287	Watson, J. August 31, 1987	A & A Trading Corp.	283049-A, etc.	Export value	F.o.b. unit 20% of d f.o.b. unit appraised unit valu difference unit valu values
V87/288	Watson, J. August 31, 1987	Kaysons Int'l, Ltd.	R69/03787	Export value	Appraised 7.5% the

## DECISIONS

ELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
invoice prices plus difference between it invoice prices and ed values	Agreed statement of facts	Philadelphia Ceramic products
unit values less ereof, net packed	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts
invoice prices plus difference between it invoice prices and ed values	Agreed statement of facts	San Diego Dinnerware
invoice prices plus difference between it invoice prices and ed values	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts
invoice prices plus differences between it invoice prices and ed values	Agreed statement of facts	Los Angeles Binoculars
invoice prices plus difference between it prices and ed values, or entered ues plus 20% of ce between entered ues and appraised	Agreed statement of facts	New York Magnetic earphones
unit values less ereof, net packed	Agreed statement of facts	San Francisco Chinaware



**ANNOUNCEMENT**

Chief Judge Edward D. Re has announced the call of the Fourth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 30, 1987, in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The theme of the Conference is "Challenges for the Bench and Bar in Perfecting the Rule of Law in Customs and International Trade Cases."

The Honorable Frank J. Guarini, a member of the Committee on Ways and Means, Subcommittee on Trade, United States House of Representatives, is the Conference Luncheon Speaker.

The Honorable Howard T. Markey, Chief Judge of the United States Court of Appeals for the Federal Circuit, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international trade law.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 400 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past three Annual Judicial Conference.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Friday, October 9, 1987.

For further information, please write to:

USCIT Judicial Conference  
c/o Office of the Clerk  
United States Court of International Trade  
One Federal Plaza  
New York, New York 10007

Dated: September 22, 1987.

JOSEPH E. LOMBARDI,  
*Clerk of the Court.*



## THE JOURNAL

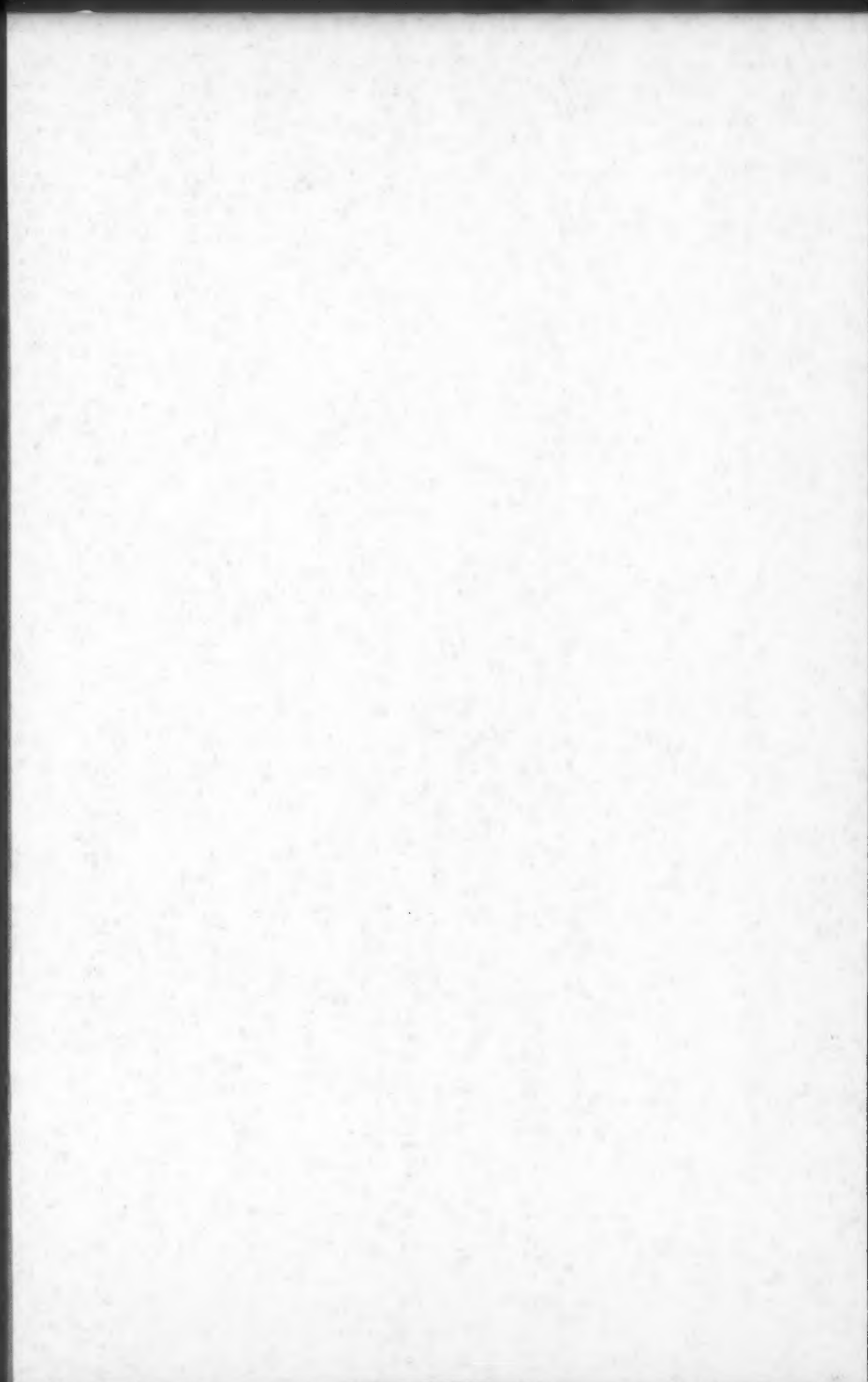
For the purpose of this journal, the following definitions have been adopted: A "journal" is a record of the events of a day, or of a series of days, in the life of a person, or of a group of persons, or of a community, or of a nation, or of the world. It is a record of the events of a day, or of a series of days, in the life of a person, or of a group of persons, or of a community, or of a nation, or of the world.

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# STATE OF

NEW YORK

IN SENATE

JANUARY 1871

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1871

ALBANY:

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